



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

September 30, 1994

Ms. Sedora Jefferson  
General Counsel  
Texas Department of Commerce  
P.O. Box 12728  
Austin, Texas 78711-2728

OR94-610

Dear Ms. Jefferson:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 24450.

The Texas Department of Commerce (the "department") has received three requests for information regarding a contract between The Trane Company and the department in connection with the State of Texas Energy Efficient Air Conditioner Program. You assert that all of the requested information is excepted from required public disclosure under section 552.103 and that portions of the information are excepted under sections 552.101, 552.107(1), 552.110, and 552.111.

We first address your section 552.103 claim because it encompasses all of the requested information. Section 552.103 of the act excepts from required public disclosure information relating to litigation "to which the state or a political subdivision . . . is or may be a party." Section 552.103 requires concrete evidence that litigation is realistically contemplated; it must be more than mere conjecture. Open Records Decision Nos. 518 (1989) at 5; 328 (1982). You state that "two attorneys representing different parties have inquired in writing as to the legal justification for a grant award made to The Trane Company. The content of these attorney inquiries leads this agency to believe that . . . all documents related to The Trane Company and this grant award are protected from disclosure under Section 552.103(a)."

The mere fact that there have been inquiries from two attorneys regarding the legal justification for an agency's action without more does not demonstrate that litigation is reasonably anticipated. We conclude that the department has not demonstrated that

litigation regarding this matter is reasonably anticipated and that the information is therefore not excepted from required public disclosure under section 552.103.<sup>1</sup>

Next, we consider your section 552.110, trade secret argument. One of the requestors has stated in a letter that his client does not seek information that is confidential under section 552.110. The other requestor has not so stated.

You assert that information submitted to the department by The Trane Company "appears to be subject" to section 552.110 of the Government Code. This exception to required public disclosure applies to

[a] trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision.

You do not provide any explanation as to why this exception applies to The Trane Company information. Generally, the Open Records Act requires a governmental body to prove that records are excepted from disclosure. *See Attorney General Opinion H-436 (1974)*. However, in a case such as this, in which a third party's privacy or property rights are implicated by the release of information, a governmental body may rely on the third party to establish that the information should be withheld under an exception intended to protect those interests. Gov't Code § 552.305.

On March 21, 1994, we notified The Trane Company that the department had received a request under the Open Records Act to inspect copies of its records and offered an opportunity for the company to assert an exception to the release of these records. To date, The Trane Company has not responded. We, therefore, assume that The Trane Company does not wish to assert a privacy or property interest in its records. Accordingly, we conclude that the department may not withhold The Trane Company records pursuant to section 552.110 of the Government Code.

You urge that section 552.101 of the Government Code, in conjunction with federal regulations may apply to two of the requested documents, which you say appear to be proposals for the expenditure of Stripper Well funds submitted to the United States Department of Energy. You have not informed us, nor are we aware, of a federal regulation that would apply to the documents at issue. Thus, you may not withhold the documents based on section 552.101 of the Government Code.

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<sup>1</sup>You state that several of the requested documents "constitute attorney work-product, party communications, statements, and other privileges recognized under discovery court rules." Discovery privileges are not exceptions to required public disclosure under the Open Records Act. *See Open Records Decision No. 575 (1990); see also Open Records Decision No. 574 (1990) (holding an attorney's work product may be withheld under section 552.103 of the Government Code if the requirements for that exception are met.)*

You assert that section 552.107(1) applies to some of the requested documents. Section 552.107(1) protects from required public disclosure information that is "privileged" under Rule 1.05 of the State Bar Rules. *See* Open Records Decision No. 574 (1990). This exception generally protects communications of legal advice and opinion and client confidences; factual notations in a file or notations concerning information garnered from third parties are not protected. *See id.* We agree that section 552.107(1) applies to some of the requested information and have marked the documents accordingly.

Finally, you raise section 552.111 of the Government Code. This exception applies to interagency or intra-agency communications that consist of advice, opinion, or recommendations which reflect the policymaking processes of the governmental body at issue. Open Records Decision No. 615 (1993). Section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of the communication. *Id.*

Section 552.111 of the Government Code excepts a preliminary draft of a letter or document, since the preliminary draft necessarily represents the advice, opinion, and recommendation of the drafter as to the form and content of the final document. *See* Open Records Decision No. 559 (1990). We agree that you may withhold the draft of a document pursuant to section 552.111 of the Government Code. In addition, we have marked portions of the other documents to which section 552.111 applies. We note that communications between a governmental body's officials and third parties, such as a representative of The Trane Company, are not protected from disclosure under section 552.111, since such communications are not "inter-agency or intra-agency" communications. *See* Open Records Decision No. 474 (1987) (letters between the Board of Pharmacy and its licensees).<sup>2</sup>

If you have questions about this ruling, please contact our office.

Yours very truly,



Kay H. Guajardo  
Assistant Attorney General  
Open Government Section

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<sup>2</sup>Sections 552.111 and 552.107(1) of the Open Records Act are discretionary exceptions. *See* Open Records Decision Nos. 630 (1994); 515 (1988). This means that the department has the discretion to determine whether to claim these exceptions. Only when information is made confidential by law is a governmental body required to withhold requested information. *See* Gov't Code § 552.007(a).

KHG/MRC/KKO/rho

Ref.: ID# 24450

Enclosures: Marked documents

cc: Mr. Thomas D. Boyle  
Gibson, Dunn & Crutcher  
1717 Main Street, Suite 5400  
Dallas, Texas 75201-7390  
(w/o enclosures)

Mr. William F. Striebe, Jr.  
United Technologies Carrier  
P.O. Box 4800  
Carrier Parkway  
Syracuse, New York 13221  
(w/o enclosures)